

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

NATHANIEL C.

Claimant,

vs.

SAN DIEGO REGIONAL CENTER,

Service Agency.

OAH No. 2010061144

**DECISION**

Robert Walker, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter in San Diego, California, on March 1, 2011.

Ronald R. House, Attorney at Law, represented the San Diego Regional Center.

Lynnanne C., claimant's mother, represented the claimant, Nathaniel C.

The record was closed on March 1, 2011.

**ISSUES**

The ultimate issue is whether claimant is eligible for regional center services.

There are intermediate issues: Is claimant autistic? Is claimant mentally retarded? Does claimant have a disabling condition that is closely related to mental retardation or that requires treatment similar to that required for individuals with mental retardation?

In this decision, it is determined that claimant failed to prove that he is eligible for regional center services.

## FACTUAL FINDINGS

### *Background*

1. Claimant, Nathaniel C., was born on September 20, 2004. At birth, he tested positive for THC in his blood. His biological mother's toxicology screen also was positive for THC, the active ingredient in marijuana. At the time of claimant's birth, his biological mother and father were homeless. Lynnanne C. adopted claimant when he was an infant.

2. "Early Start" is the common name of a federal program that provides services for infants and toddlers who are at risk for certain disabilities. The controlling federal law is Subchapter III of the Individuals with Disabilities Education Act (IDEA).<sup>1</sup> The federal law provides states with an opportunity to receive federal funds for services to certain children 36 months of age and younger. As a condition of receiving federal funds, participating states must agree to comply with federal rules and regulations. California chose to participate. California's implementing legislation is the California Early Intervention Services Act.<sup>2</sup>

3. The regional center determined that claimant was eligible for Early Start services.

4. Regional centers also provide services pursuant to the Lanterman Act.<sup>3</sup> One is eligible for Lanterman Act services if one is developmentally disabled. The Lanterman Act defines developmental disability.

"Developmental disability" means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall

---

<sup>1</sup> 20 U.S.C. § 1431 *et.seq.* Implementing regulations are found in volume 34 of the Code of Federal Regulations beginning at section 303.

<sup>2</sup> Gov. Code § 95000 *et.seq.* Implementing regulations are found in title 17 of the California Code of Regulations beginning at section 52000.

<sup>3</sup> The Lanterman Developmental Disabilities Services Act begins at Welfare and Institutions Code section 4400.

not include other handicapping conditions that are solely physical in nature.<sup>4</sup>

5. On September 20, 2007, claimant turned three years old and, therefore, no longer qualified for Early Start services. Regional center evaluated claimant and determined that he was not eligible for Lanterman Act services.

6. In March of 2010, claimant's mother asked regional center to reevaluate him. Regional center reevaluated claimant and, again, determined he was not eligible. Claimant's mother appealed, and that appeal is the subject of the present proceeding.

### *History of Evaluations*

7. Claimant's individual service plan for Early Start did not provide for autism services. From that, one can infer that his Early Start teacher did not suspect autism.

8. In May of 2006, Dr. Kim Wilkes, who was with the Rady Children's Hospital Developmental Evaluation Clinic, evaluated claimant. The results indicated mental development in the low average to borderline range with relative weakness in language skills and relative strength in non-verbal problem-solving skills. Claimant also had average to low-average motor skills.

9. On August 31, 2007, in anticipation of claimant's turning three years old, the regional center asked Martha C. Hillyard, Ph.D., to do a psychological assessment to be used in determining whether claimant was eligible for Lanterman Act services. Dr. Hillyard administered the Bayley Scales of Infant & Toddler Development, Third Edition. And she had claimant's mother complete the Vineland Adaptive Behavior Scales, Second Edition. The results showed that claimant's adaptive functioning was good. He had a deficit in social functioning, but Dr. Hillyard observed that he was friendly and interactive. Claimant initiated conversation, asked for things, and made demands. Also, Dr. Hillyard observed that claimant was very responsive to praise and applause but would also work for negative attention. There was a deficit in language functioning. In Dr. Hillyard's report, she wrote:

Although Nathaniel's cognitive functioning currently centers just within the average range, the attention related and behavioral issues often disrupt his problem solving, leading to inconsistent performance. In many respects, Nathaniel's language development also centers just within the average range although his development in this area is still uneven. He has a good vocabulary and does well on skills emphasized in speech therapy but still lacks some skills which have not been specifically taught. Nathaniel's fine and gross motor development centers at a low average level.

---

<sup>4</sup> Welf. & Inst. Code, § 4512(a).

[¶] . . . [¶]

Nathaniel also is very strong willed and often non-compliant. My impression is that this little boy may well be showing early signs of an attention deficit hyperactivity disorder (ADHD). He also will work for negative attention, and it will be important to monitor him carefully to make sure his strong willed behavior does not develop into an ingrained oppositional pattern.

10. As noted above, when claimant was three years old, regional center determined he was not eligible for Lanterman Act services. That determination was based, in part, on Dr. Hillyard's psychological assessment.

11. On November 2, 10, and 16, 2009, the San Diego Unified School District did a psychological assessment. A written report is dated December 16, 2009. Under "testing observations," the report says:

Nathaniel presents himself as a friendly, happy young boy. He came willingly with the examiner to her office and was very conversant. . . . Nathaniel had significant difficulty focusing on what was presented and needed frequent breaks. . . . He was impulsive in his answer selection and had to be repeatedly encouraged to listen and think before answering. As a result of these behaviors, it was difficult to get a valid measure of Nathaniel's true ability. The following results should be interpreted with caution as they are believed to be an underestimation of Nathaniel's true ability level.

12. As part of the San Diego Unified School District psychological assessment, the evaluator had a school aide complete a Gilliam Autism Rating Scale (GARS-2). The evaluator also had claimant's mother complete a GARS-2. The aide's ratings resulted in an autism index of 45, which indicated that it is unlikely that claimant is autistic. The mother's ratings resulted in an autism index of 94, which indicated that it is very likely that claimant is autistic. The evaluator, based on her own observations and interviews with others, concluded that claimant was not autistic. She wrote:

Based on examiner's observations and interviews with others, Nathaniel does exhibit some of the behavioral characteristics associated with autism; however, the underlying issue appears to be his limited attention/ability to focus as well as his impulsivity rather than an indication of autism.

13. On December 15, 2009, Melissa O'Connell, Ph.D., who was with Rady Children's Hospital, did a developmental evaluation. She wrote a report dated December 27, 2009. In "behavioral observations," Dr. O'Connell wrote:

[In the examination room] Nathaniel immediately began to play with the toys that were available and quickly became comfortable with the examination room. . . . Although frequently reminded not to go into cabinets or to climb on furniture, Nathaniel persisted and often looked at the adults in the room to see if they were watching him or would try to intervene.

During the more structured tasks of formal testing, Nathaniel was impulsive and fidgeted with the manipulative items that were presented. It was difficult to maintain Nathaniel's interest in the tasks . . . . [¶] Given Nathaniel's general non-compliance during testing today, the results of today's evaluation should be interpreted with caution as they may not provide an accurate representation of where Nathaniel's skills are at this time.

14. Dr. O'Connell made provisional diagnoses as follows: Pervasive Developmental Disorder, Not Otherwise Specified; Attention Deficit Hyperactivity Disorder; and Oppositional Defiant Disorder. Dr. O'Connell did not diagnose autism, and she did not diagnose mental retardation.

15. As noted above, claimant's mother, in 2010, asked regional center to reevaluate claimant. On March 17, 2010, Carol P. Campbell, a service coordinator for the regional center, met with claimant and his mother and wrote a report. Ms. Campbell wrote that, when she initially greeted claimant, he made no eye contact but that later in the meeting he did make some eye contact when Ms. Campbell spoke with him. When Ms. Campbell asked claimant how he was doing, he said he was fine. Claimant was wearing a St. Patrick's Day hat and, at one point, told Ms. Campbell where he got it. Claimant played with toys in the room and seemed to enjoy dumping things on the floor or table. Claimant impulsively grabbed a notebook and his mother's purse. He asked his mother to tell Ms. Campbell that he had thrown up.

16. As part of the 2010 reevaluation, regional center asked S. Ann Corrington, Ph.D., a clinical psychologist, to do a psychological evaluation. Dr. Corrington evaluated claimant on March 29, 2010, and wrote a report. Dr. Corrington reviewed previous evaluations and administered a number of tests. Dr. Corrington diagnosed pervasive developmental disorder, not otherwise specified. She noted there was a history of an earlier diagnosis of attention deficit/hyperactivity disorder, combined type. And she noted that there was a medial record of exposure to drugs in utero. Dr. Corrington did not diagnose autism, and she did not diagnose mental retardation.

17. Harry Eisner, Ph.D., is the Coordinator of Psychology Services for the regional center. He has been with the regional center for 22 years and estimates that he has dealt with 10,000 to 30,000 eligibility cases. Dr. Eisner was licensed as a psychologist in California in 1985. On September 21, 2010, Dr. Eisner observed claimant at school, spoke

with claimant's teacher, and asked her to complete a Social Responsiveness Scale regarding claimant. Dr. Eisner observed that claimant was a challenging child who had high energy. Dr. Eisner concluded that claimant did not appear to have autism; rather, his behaviors were consistent with attention deficit/hyperactivity disorder, which is consistent with drug exposure in utero.

18. Dr. Eisner wrote a psychological evaluation dated September 27, 2010. He reviewed claimant's history as reflected in reports and evaluations and as reported by claimant's mother. Dr. Eisner noted that claimant has many challenging behaviors. Claimant is in a special day class at school and has a school designation of "Other Health Impaired." Dr. Eisner wrote that that designation reflected "a diagnosis of attention deficit/hyperactivity disorder."

19. Dr. Eisner referred to a number of earlier evaluations. He referred to Dr. Hillyard's August 31, 2007, evaluation and noted the following: The Bayley Scales of Infant & Toddler Development, Third Edition, that Dr. Hillyard administered produced a score that fell in the average range. Dr. Hillyard observed that claimant was friendly, talkative, restless, and impulsive. Dr. Hillyard concluded that claimant might be showing early signs of ADHD.

20. Dr. Eisner referred to the November 2, 10, and 16, 2009, San Diego Unified School District psychological assessment and noted the following:

On the Reason for Referral, they noted that he was receiving services under the qualifying condition of "Speech and language impairment." They noted that he had significant behavioral problems that included inattention, distractibility, non-compliance, and physical aggression. They also noted that he was not progressing well academically. . . . [¶] They commented, "Nathaniel did engage with peers appropriately and displayed imaginative play; however, this was only brief due to his high distractibility." The evaluator described him as a "friendly, happy young boy."

21. Dr. Eisner referred to Dr. O'Connell's December 15, 2009, evaluation and noted the following: Claimant was physically active and often non-compliant. "On the verbal portion of the Differential Abilities Scales – 2<sup>nd</sup> Edition, he achieved a verbal composite of 82, a special ability composite of 61, and a prorated general conceptual ability score of 70. His scores on the Vineland Adaptive Behavior Scales fell in the mid 60's." Dr. Eisner noted that claimant's mother reported to Dr. O'Connell that claimant showed an interest in other children but that his cooperative play was weak. Also, he had difficulty following rules. Dr. O'Connell gave a "provisional diagnosis of pervasive developmental disorder, not otherwise specified."

22. Dr. Eisner referred to Dr. Corrington's March 29, 2010, evaluation and noted the following: "The examiner described him as alert and interactive, although sleepy at times. . . . On the Wechsler Preschool and Primary Scale of Intelligence, Nathaniel received a verbal scale IQ of 81, a performance scale IQ of 70, and a full scale IQ of 74. His subtest scores ranged from average to two standard deviations below the mean. His adaptive functioning was in the borderline range, and his academics ranged from low average to borderline." The evaluator considered the possibility of autism, but did not diagnose autism. Rather, she diagnosed pervasive developmental disorder – not otherwise specified.

23. In Dr. Eisner's report, he wrote about his visit to claimant's school on September 21, 2010. Dr. Eisner wrote the following: He observed claimant for one hour and 40 minutes in the classroom, during a recess, and during snack time. Claimant explained to his teacher why he was the first student to arrive, and he asked her for help in propping open the door. In circle time, claimant was an active communicator. He talked about a number of things and used hand gestures to describe a ride. Claimant was intermittently cooperative and defiant. With a pleased expression on his face, claimant offered cupcakes to the teacher and other children. He made brief comments to the other children and to adults. Claimant swept the floor for a few minutes. During most of the recess, claimant was on his own. He rode a tricycle and occasionally stopped to exchange a word with another child. Monica Neumyer, claimant's teacher told Dr. Eisner that, as a result of claimant's attention problems, his performance can be varied, but he appears to be managing well. Claimant does not engage in obviously unusual behaviors at school. He will talk about activities he likes and does not become overly focused on a particular topic. There is nothing unusual about the tone or rate of claimant's speech. At Dr. Eisner's request, Ms. Neumyer completed a Social Responsiveness Scale for claimant. The score was 63. Scores from 60 to 75 "indicate deficiencies in reciprocal social behavior . . . resulting in mild to moderate interference in everyday social interactions."

24. In Dr. Eisner's report, he concluded the following:

Nathaniel is a challenging child to care for both at home and at school. He experiences significant difficulties with both learning and self-regulation and has required a considerable amount of attention both at home and at school. Nathaniel will continue to need that support for the foreseeable future.

[¶] . . . [¶]

In all settings, Nathaniel shows clear evidence of attention deficit/hyperactivity disorder with issues of self-regulation most prominent. He also shows significant learning difficulties. Although Nathaniel shows some mild sensory differences, those are not sufficient to result in a diagnosis of autistic disorder. They may also be readily captured under the heading of attention deficit/hyperactivity disorder. Nathaniel presents a

challenging management problem both at home and at school and will continue to need a significant amount of support into the foreseeable future.

25. Claimant's mother engaged Alan Lincoln, Ph.D., to evaluate claimant. Dr. Lincoln saw claimant on November 29, 2010, and wrote a report. Dr. Lincoln reviewed claimant's history and administered a number of tests. In his "Diagnostic Impressions" for Axis I, he wrote Pervasive Developmental Disorder, Not Otherwise Specified, Attention Deficit Disorder, Combined Type. For Axis II Dr. Lincoln diagnosed Borderline Mental Retardation.

26. Dr. Eisner testified that whether a diagnosis of autism is warranted depends on whether a subject meets the diagnostic criteria set forth in the Diagnostic and Statistical Manual, Fourth Edition, Text Revised (DSM-IV TR). One part of the DSM-IV TR deals with "Pervasive Developmental Disorders," which include autism. There is a range of diagnoses on what is known as *the autism spectrum*. One diagnosis on the spectrum is pervasive developmental disorder, not otherwise specified. The most severe diagnosis on the spectrum is autism. The various diagnoses are mutually exclusive. Thus, for example, a child who is autistic cannot have pervasive developmental disorder, not otherwise specified. And a child who has pervasive developmental disorder, not otherwise specified cannot be autistic.

27. Dr. Eisner observed that Dr. Lincoln did not diagnose autism. He diagnosed pervasive developmental disorder, not otherwise specified, which is on the autism spectrum. Dr. Eisner testified that he does not agree that that diagnosis is warranted, but in any event, the critical issue regarding eligibility for regional center services is that Dr. Lincoln did not diagnose autism.

28. Dr. Eisner was critical of Dr. Lincoln's diagnosis of Borderline Mental Retardation. Dr. Eisner said that, under the DSM-IV, there is no such diagnosis. The term "borderline" is used in connection with cognitive functioning; it is used in connection with a person's skills and accomplishments. It is not used in connection with IQ, which has to do with one's capabilities. Dr. Eisner testified that claimant's scores on IQ tests show that he is not mentally retarded. His score of 74 is low but not in the mental retardation range. And his sub test scores vary substantially, which is inconsistent with mental retardation. People who are mentally retarded generally have flat, low scores across the board on sub tests.

29. The variety in claimant's sub test scores also indicates that he does not have a disabling condition that is closely related to mental retardation or that requires treatment similar to that required for individuals with mental retardation.

#### *Claimant's Mother's Testimony*

30. Claimant's mother contends that having a diagnosis of a condition that is on the autism spectrum should be sufficient to make one eligible for services.



31. Claimant's mother needs help. She does not know where to turn. Everyone agrees that claimant needs help, and she simply is trying to find help for him. She is tired of fighting with everyone in her effort to get the help claimant needs. She is exhausted from taking care of claimant.

32. Claimant's mother wants claimant to be able to function in society. She does what she can to promote that goal. She reads to claimant. She encourages him to use a computer. She forces him to do math.

33. Claimant is a danger to himself and to others. He deserves help. He will not simply outgrow these problems. He deserves help so that he can have a chance to overcome his problems.

## LEGAL CONCLUSIONS

1. One is eligible for regional center services if one is developmentally disabled.

“Developmental disability” means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.<sup>5</sup>

2. There is no evidence that claimant has cerebral palsy or epilepsy.

3. Autism is the only condition on the autism spectrum that the legislature has included in the eligibility categories. Many people with other conditions on the autism spectrum need and deserve help, but help is not available for them under the Lanterman Act. No one has diagnosed claimant as being autistic.

4. No one had diagnosed claimant as being mentally retarded.

---

<sup>5</sup> Welf. & Inst. Code, § 4512(a).

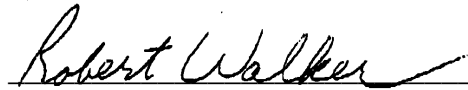
5. Dr. Eisner's testimony regarding the fifth category was convincing and was not controverted. The variety in claimant's sub test scores on IQ tests indicates that he does not have a disabling condition that is closely related to mental retardation or that requires treatment similar to that required for individuals with mental retardation.

6. Claimant is not eligible for Lanterman Act services.

### ORDER

Claimant's appeal from regional center's determination that he is not eligible for regional center services is denied.

DATED: April 1, 2011

  
ROBERT WALKER  
Administrative Law Judge  
Office of Administrative Hearings

### NOTICE

**This is the final administrative decision in this matter. Each party is bound by this decision. If a party chooses to appeal, an appeal from this decision must be made to a court of competent jurisdiction within 90 days of receipt of this decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)**